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Medical Law and the Power of Life and Death

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Abstract

The purpose of this article is to offer an analysis of the nature of contemporary legal power over the ending of human life in medical contexts. Drawing on Michel Foucault's characterisations of power relations in the sphere of life and death in *The History of Sexuality – Vol. I*, it is argued that, in its current regulation of the ending of human life in this area, law displays elements of two of those modes, or forms, of power identified by Foucault – the juridical and the disciplinary. This argument is illustrated by reference to two recent cases – *Re A (Children)* and *Re B (an adult: refusal of medical treatment)* – and set against a background of shifting modes of governmentality (here, the movement from medicalisation to legalisation). Through an analysis of the forms of legal power in this particular context, the article also has a broader purpose – to advance an alternative approach to the question of power within the academic medical law field. Specifically, unlike the standard form of legal academic inquiry in this area – that is, one which is driven mainly by a concern for ethics and resolving ethical dilemmas – it is suggested that an appreciation of the importance that institutional context(s) and requirements play in medical law is necessary if we

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are to understand fully both the factors constitutive of legal power and the subtle, and often controversial, effects that flow from the manner in which it is exercised and asserted.

I Introduction

For a long time, one of the characteristic privileges of sovereign power was the right to decide life and death. (Foucault, 1978: 135)

Deciding disputed matters of life and death is surely and pre-eminently a matter for a court of law to judge. (*Re A (Children)*, per Ward LJ)¹

The uptake of Michel Foucault's work on power in the social sciences has mainly been concerned with his notion of bio-power. Whether focussing on the disciplinary or bio-political sub-sets of bio-power, it has been what Foucault said about the power exercised over human life – how to manipulate it, monitor it, and make it more useful to the community – that has caught the attention of many social scientists.² While interesting, this concern is far from surprising. As the above quotation implies, Foucault considered the power to make decisions about the existence or destruction of human life an ancient right that no longer reflected the fact that it was life, and not death, around which modern power relations revolved.

In this article, I want to resurrect, and focus on, this question of the relationship between power and death. In particular, I seek to assess the usefulness of Foucault's characterisations of power relations – both his notion of the juridical or 'sovereign power' *and* his idea of bio-power – for thinking through the relationship

¹ [2000] 4 All ER 961, at 968.

² Some of the more prominent writers who have been influenced by this aspect of Foucault's work include Nikolas Rose (sociology; see, for example, Rose (2001)), Michael Hardt and Antonio Negri (political theory; see Hardt and Negri (2000)), Giorgio Agamben (philosophy/political theory; see Agamben (1998)), and Paul Rabinow (anthropology; see Rabinow (1999)).

between contemporary legal power and questions about the ending of human life in medical contexts. In other words, I want to ask if Foucault's analyses of power, *including* those that concerned themselves with identifying the mechanisms through which societies sought to produce more useful human life, can assist us in understanding the manner in which contemporary law manages *death* in disputes arising in the field of medical practice. I will suggest that they can.

To date, the analysis of the nature of law's increasing power over the existence of human life in the medical context has tended to adopt a particular form. The guiding logic or mode of analysis of much of the academic literature on legal regulation, not only in this sphere but also across what may be described as the medical law field generally, is driven by a concern for ethics and ethical principles.³ The form of inquiry usually undertaken seeks both to establish the degree to which the law recognises and implements various ethical values – human rights and autonomy are often marked out as particular favourites – and, to the extent that it fails to do so, to call for reform of the offending legal approach or practice.⁴ While this type of analysis is by no means devoid of usefulness,

³ For a similar characterisation of the dominant mode of reflection in this field, and an interesting attempt to promote an alternative methodology – an epistemic approach to the relationship between the common law and medicine – see Harrington (2002).

⁴ A relevant example in the context of this article would be Vanessa Munro's analysis of *Re A (Children)*, in which she argues for the incorporation of a relational idea of rights in legal reasoning 'in contexts within which the identification of abstract and disinterested individual legal subjects is not always possible, nor profitable.' See Munro (2001: 461). For a discussion of the ethical principles at play in the other case discussed in this article – *Re B (an adult: refusal of medical treatment)* [2002] 2 All ER 449 – see, for example, Huxtable (2002). More generally, a perusal of some of the standard, and influential, 'medical law' textbooks reveals the dominance of the 'ethics' approach to the subject. Amongst others, see, for example, Davies (1998: 3), in which the author states: 'The link between medical ethics and its practical expression in law *is the essence of defining medical law*.' (My emphasis); and, Mason, McCall Smith, and Laurie (2002), especially Chapter One. For a recent example of this approach in the area of human rights and medical law, see McLean (1999).

implicit in it is a tendency to equate legal power with the degree to which it implements, or arrives at, 'correct' resolutions of ethical dilemmas. In the current context, at least, this tendency obscures from view the different types of power at work in the legal regulation of the existence of human life. Specifically, it fails to note and, therefore, to explain how certain institutional exigencies and practices within the common law shape the development and expression of those various modes of power. The source of legal power in this area is often not the ethical reasoning of judges; rather, it can be located in the more mundane practices and traditional techniques of common law reasoning. Thus, what follows is an attempt to expand the range of vantage points from which to reflect on, and understand, the nature of contemporary law's increasing involvement in regulating, or managing, the boundaries of human life in medical contexts. By doing so, I hope that some of the less obvious, but by no means less important, factors constitutive of that involvement can be brought into focus. It is my argument that Foucault's work on power is a useful resource by which to conduct such an inquiry.⁵

While this study of the different types of legal power over the ending of human life forms the central focus of the article, this specific topic is indicative of a broader transformation that has been occurring over the last few decades – that is, the increasing role of law in managing various issues and conflicts arising in the field of medical practice. Consequently, it will be useful to preface the substantive analysis of the article with a brief discussion of the possible reasons behind this

⁵ It should be noted that aspects of Foucault's work have been deployed within the medical law/health care law field before. For a notable example, see Sheldon (1997).

transformation. In section two, and in a very preliminary manner, I will suggest that what we are, and have been, witnessing is what Dingwall and Hobson-West have described as: ‘the substitution of legalisation for medicalisation as the paramount mode of governmentality.’ (Dingwall and Hobson-West, 2006: 41) I will argue that their analysis provides a convenient framework within which the substantive topic of this article is capable of being understood. In the third section, I will outline part of Michel Foucault’s genealogical inquiries into power, and, more specifically, his characterisation of the changing nature of power relations over life and death. Thereafter, and by way of an analysis of two recent cases in the English courts, I seek to demonstrate how Foucault’s notions of the juridical and bio-power can assist in identifying some of the characteristics of contemporary legal power over the existence of human life in medical contexts.⁶ Despite the differences in the precise forms and modes of operation of power found to exist in each case, it is argued that the manner in which law asserts its power and function in both cases – stressing the objectivity and neutrality of the common law’s practices – is similar. This legal assertion of power and function is, in itself, an important instance of power in that it works to obscure from view the often controversial consequences of the manner in which legal power is exercised in this area. Finally, I conclude by suggesting that, in order to grasp the type of hidden institutional power dimensions identified in this article, academic

⁶ It is worth noting that no attempt is made here to present a comprehensive account of all the possible ways in which law exercises power in so-called ‘end-of-life’ cases. Consequently, many cases that might be thought to require inclusion in such a discussion are not mentioned, far less discussed. The purpose here is not to present a compendium of cases; rather, it is to take a couple of recent and prominent examples and to focus on how one might usefully conceptualise an interesting and increasing legal reality – the power that law exercises over the existence of human life in medical contexts.

medical law must seek to expand the range of analytical tools which it currently deploys to explain and understand its object of research.

II SHIFTING MODES OF GOVERNMENTALITY: FROM MEDICALISATION TO LEGALISATION

How can we account for the emerging involvement of law in a number of issues and problems which, had they arisen in the past, would have fallen to be discussed and resolved within the province of medicine? Why, as Ward LJ's words above confirm, is law increasingly coming to be viewed as the preferred mechanism through which to settle disputes arising in the domain of medical practice? More broadly, what are the conditions responsible for this apparent shift in authority from medicine to law in contemporary Western societies? While it is impossible to address those questions adequately in this article, I do want to begin to think through the wider processes that may be responsible for the more frequent recourse to law in this area that we are witnessing today. Drawing on the work of Dingwall and Hobson-West in the field medical sociology, I will suggest that their identification of a shift from medicalisation to legalisation in contemporary Western societies provides, in general terms, a useful framework within which to comprehend the specific examples discussed in this article.

Mitchell Dean has observed that:

The capacity to manipulate our mere biological life, rather than simply to govern aspects of forms of life, implies a bio-politics that contests how and when we use these technologies and for what purposes. It also implies a redrawing of the relations between life and death, and a new 'thanato-politics', a new politics of death. (Dean, 2004: 16)

Two points can be noted from this observation. First, human beings' increasing

ability to manipulate their biological functions has consequences for traditional notions of health and illness, and of life and death. Technological developments in medicine and the life sciences – such as the invention of the mechanical ventilator or respirator in the 1950s and the potential medical applications of research in molecular biology, especially in the field of human genetics – have had, and no doubt will continue to have, the effect of transforming social and cultural perceptions of what it means, for example, to have a life.⁷ But, crucially, and this is the second point, those developments are also sources of conflict. The enhanced capacity to sustain human life and to manipulate its fundamental components results in questions concerning, and disputes over, the extent to which medical practice ought to deploy those capabilities in particular cases. The withdrawal of artificial nutrition and hydration from patients in a permanent vegetative state⁸; the question of whether to provide ventilation to seriously ill babies⁹; the diagnosis and selection of embryos for the purpose of creating healthy human beings¹⁰ – all these examples illustrate the conflict surrounding the existence of human life that can ensue from the application of technological developments in the field of medical practice.

Dean's use of the word 'politics' (in both its 'bio' and 'thanato' formulations) is therefore useful as it accurately captures the contestation and conflict produced as a result of the ever growing technological ways in which human life can be

⁷ The ventilator, for example, can keep unconscious patients 'alive' indefinitely.

⁸ See, for example, *Airedale NHS Trust-v-Bland* [1993] AC 789.

⁹ See, for example, *Re Wyatt (A Child) (Medical Treatment: Parent's Consent)* [2004] EWHC 2247; [2005] All ER (D) 294; [2005] EWHC 693 (Fam.).

¹⁰ See, for example, *R (on the application of Quintavalle) v Human Fertilisation and Embryology Authority* [2003] 3 All ER 257.

manipulated. But while such developments clearly contribute to the creation of the types of conflict which courts increasingly tend to arbitrate, they do not sufficiently explain why law is coming to be seen as the preferred institution through which the issues and conflicts arising in the domain of medical practice are to be managed and regulated. In order to address this question, I will draw on an essay by Robert Dingwall and Pru Hobson-West. (Dingwall and Hobson-West, 2006)

Dingwall and Hobson-West argue that the challenge to medicine today can best be understood as part of a broader shift from medicalisation to legalisation – that is, a shift in the mode of governmentality. They define this latter term as relating to ‘the interlocking systems of values and institutions constitutive of the ordering of a society.’ (2006: 41) Consequently, what we are witnessing today is not merely a challenge by law to medicine in the narrow sense, for example, of the courts regulating aspects of doctors’ practices or procedures; more fundamentally, a shift in the values and institutions underpinning the very manner in which authority is exercised and society ordered is underway. Viewed in this light, ‘The fundamental challenge to medicine is not from law but from the governmentality that favours law as its operative strategy.’ (2006: 57)

This ‘governmentality that favours law as its operative strategy’ – that is, legalisation – reflects a society in which the individual and his or her particular interests, rights, and agreements constitute the definitive values. Personal autonomy and self-reliance become the guiding principles of social organisation and Dingwall and Hobson-West argue that this state of human relations is ripe for

‘the colonial aspirations of law’ because: ‘Law casts human beings as self-sufficient individuals, intentional actors and guardians of their own interests.’ (2006: 54) The consequence of this is that not only does law come to be treated as the preferred means by which to settle disputes and seek redress of one’s grievances; but, in the very process of acting in such a capacity, the institution of law plays a crucial role in reinforcing and perpetuating the type of social organisation that calls it into play in the first place. In other words, rather than simply being used as the most obvious location for the expression of individuals’ rights and interests, law’s burgeoning authority means that it plays an integral role in constructing and maintaining the social order of which it is a part.

Medicalisation, on the other hand, and at least after the creation of the National Health Service in the UK in 1948, was one aspect of a different mode of governmentality – that is, one which ‘reache[d] out to embrace the population in a moral community, a holistic vision of a welfare society.’ (2006: 55) This was the era of social medicine which, amongst other things, was defined by the importance of community and the protection of the less fortunate members of society (in this case, the sick). The coincidence of those values with the broader ethos of the welfare state meant that medicine and medical professionals occupied a central and authoritative role in the overall ordering of society. Thus, according to Dingwall and Hobson-West, it would be incorrect to conceive of medicalisation as an attempt by medical professionals to colonise various areas and aspects of social life; rather, it is to be better thought of ‘as one aspect of the governmentality of social democracy where ‘the imperfections of the market

are...tempered by measures of social reform based on the values of an enlightened bourgeoisie'. (2006: 53, reference omitted)

Dingwall and Hobson-West point to several examples in the medical field which underline the displacement of medicalisation by legalisation in contemporary Western societies. Increasing resort to litigation for the purpose of seeking individual redress of one's grievances; the erosion of trust in the doctor-patient relationship; the willingness to challenge medical professionals' opinions; the contractualisation of health care services – all are indicative of the decline of medicalisation as the dominant mode of governmentality and the corresponding emergence of legalisation in its place.¹¹ The institution of law therefore comes to play a central role in managing the uncertainty and disorder produced by the retreat of medicalisation. In doing so, however, it also contributes to the maintenance of a new type of social order and organisation (a new mode of governmentality) – one defined by self-reliance and the assertion of individual rights and interests.

Dingwall and Hobson-West's characterisation of the relationship between medicine and law as one concerning a more fundamental shift in the mode of governmentality in contemporary Western societies provides a loose, but useful, framework within which to understand both the more prominent role of law in managing disputes arising from medical practice and the specific examples

¹¹ It is, of course, possible to comprehend this particular shift in the mode of governmentality as a specific instance of a broader retreat of the role of the welfare state and the values upon which it was founded. Simultaneously, we have witnessed the emergence of the individual as 'the reproduction unit of the social in the lifeworld', as Ulrich Beck has so memorably described it. (Beck, 1992) For accounts of the diminution of the welfare state, and the range of consequences flowing from this, see, for example: Wacquant (1999) & (2001), and Bauman (2005).

discussed in this article. Their analysis, however, does not, and cannot, tell us much about the specific nature of law's power over the ending of human life in medical contexts. In order to study this, I will draw on some aspects of the work of that writer who originally advanced the idea of 'governmentality' – Michel Foucault.¹²

III Foucault and 'The Right of Death and Power over Life'

In the final Part of *The History of Sexuality Volume 1* – 'Right of Death and Power over Life' – Foucault traces the nature of the transition from a juridical form of power relations to one he describes as bio-power (Foucault, 1978: 133-59). The former was embodied in the sovereign whose privilege it was to decide on the existence of human life. This privilege, which Foucault says was 'in reality the right to *take* life or *let* live', could be thought of as specific to a particular type of historical society where power took the form of repression, and where seizure of, *inter alia*, life itself was the ultimate form of suppression (1978: 136. Emphasis in original). Moreover: '[The] symbol [of this 'right']...was the sword.' (1978: 136) Significantly, in such a society, the sovereign's right of death existed for the sole purpose of protecting and, therefore, sustaining his own life.

It is important to note that, even though the sovereign often deployed this right of force through the law, Foucault does not equate the notion of the juridical with law. Rather, it refers to a specific arrangement of power relations – one that he describes as 'deductive'. This top-down form of power relations manifests itself in

¹² Foucault's essay on governmentality can be found in Foucault (2001c). This notion has influenced the work of many social scientists. See, for example, Rose and Miller (1992), and Dean (1999).

various ways. Thus, as well as the seizure of life, it is intimately bound up with the prevention of certain acts and the permission of others. A specific threshold of individual conduct is established in advance and the freedom to act or not is determined by reference to this. Conduct which transgresses the threshold is prohibited; that which does not, is permitted. As Victor Tadros comments: 'Juridical power operated by defining a threshold between two fields of activity. Either one had crossed the threshold or one hadn't.' (Tadros, 1998: 89) While not the sole prerogative of the legal field, historically the law played a significant role in defining the appropriate threshold beyond which certain acts were to be punished. Finally, it is important to stress that it is no part of Foucault's argument that the juridical notion of power relations no longer exists in modern societies; he simply believes that it no longer accurately reflects the main form of power relations in such societies – namely, bio-power.

According to Foucault, bio-power signalled a transformation in the 'mechanisms of power'. Since the classical age,¹³ it is no longer the juridical form of power characteristic of the sovereign's right of life and death (either to destroy life or to allow it to continue) that predominates; rather, a multitude of forms of power comes into existence whose purpose is to shape, administer, and control human life in all its various manifestations. Life becomes something to be managed and directed, as opposed to simply allowed or ended. It is this positive, productive control of *life*, and not the right to kill (death), that defines the nature of bio-power.

¹³ In Foucault's work, the classical period runs approximately from the middle of the seventeenth century to the end of the eighteenth. See, for example, his study of madness which focuses on this period – Foucault (2001a).

And yet, as Foucault points out, this sustenance and shaping of life is not accompanied by the disappearance of killing; indeed, quite the contrary. What does alter, however, are the justifications for the exercise of the 'power of death'. In the age of bio-power, killing is not carried out in order to protect the life of the sovereign but, rather, all lives – that is, the life of the population. In other words, the 'power of death' becomes directly linked to the central objective of bio-power – namely, 'the biological existence of a population.' Foucault succinctly sums up the nature of the transformation in power relations as follows: 'One might say that the ancient right to *take* life or *let* live was replaced by a power to *foster* life or *disallow* it to the point of death.' (Foucault, 1978: 138)

Bio-power took two different, but related, forms.¹⁴ The first was known as *disciplinary* power. Its focus was the body. The purpose was to discipline this so that its utility could be maximised and its functional capabilities tailored to, and incorporated within, 'systems of efficient and economic controls' (1978: 139). In contrast to what Foucault calls 'penal law' – which was a type of juridical power that was administered in the course of judicial practice – disciplinary power was a 'nonjudicial power', exercised by various bodies, including medical, psychological, and psychiatric institutions (Foucault, 2001: especially 52-89). Characteristic of this form of power was the 'examination' – a process of supervision of individuals by, *inter alia*, doctors and psychiatrists that produced

¹⁴ In this article, I shall concentrate solely on the 'disciplinary' form of bio-power. The other form is what Foucault refers to as 'a bio-politics of the population'. While still having the management and control of life as its objective, this second form of power relations widened its scope beyond the disciplining of individuals' bodies to focus on those of a population generally. Here, the target became 'the species body, the body imbued with the mechanics of life and serving as the basis of the biological processes: propagation, births and mortality, the level of health, life expectancy and longevity, with all the conditions that can cause these to vary.' Foucault (1978: 139)

knowledge about those individuals:

A knowledge that now was no longer about determining whether or not something had occurred; rather, it was about whether an individual was behaving as he should, in accordance with the rule or not...This new knowledge was no longer organized around the questions: "Was this done? Who did it?"...[I]t was organized around the norm, in terms of what was normal or not, correct or not, in terms of what one must do or not do.¹⁵ (Foucault, 2001: 59)

In other words, rather than establishing whether individuals' specific acts had contravened rigid rules, it was who these individuals were and how they might act in the future that formed the focal points of investigation in disciplinary society. The activity of defining thresholds gives way to the imposition of implicit norms of behaviour, character, and attitude that may or may not be met by the individual. Rather than transgressing such norms, individuals will live up to them, or fail to do so, to varying degrees. The purpose of these various institutions was to 'train' the sick, the mentally infirm, and the criminals so that their future habitual actions would conform, or approximate as closely as possible, to 'society's' expected norms of behaviour. Tadros usefully identifies the crux of the difference between the juridical and bio-power in the following way: 'Power is not only preventative [the juridical], it is also creative [bio-power] or as Foucault would put it, it is not only deductive, it is also productive.' (Tadros, 1998: 77-8)

Despite his statement that disciplinary power was a 'nonjudicial power', Foucault nevertheless envisaged consequences for law of the transformation in the

¹⁵ This type of analysis has been taken up by Nikolas Rose in his study of the social role of psychology and psychologists in the years immediately preceding World War II. Describing the function of what he calls 'the psychology of the individual', he says: 'Psychological agents and techniques are involved in assessment and diagnosis of problems of individual conduct in institutional sites such as hospitals, schools, prisons, factories and in the army.' (Rose, 1985: 1) He continues: 'Psychological knowledge of the individual was constituted around the pole of abnormality...This psychology sought to establish itself by claiming its ability to deal with the problems posed for social apparatuses by dysfunctional conduct.' (1985: 5)

concept of power relations from the juridical to bio-power. Given their importance in the current context, it is worth quoting his reflections at length:

Another consequence of this development of bio-power was the growing importance assumed by the action of the norm, at the expense of the juridical system of the law. Law cannot help but be armed, and its arm, *par excellence*, is death; to those who transgress it, it replies, at least as a last resort, with that absolute menace. The law always refers to the sword. But a power whose task is to take charge of life needs continuous regulatory and corrective mechanisms. It is no longer a matter of bringing death into play in the field of sovereignty, but of distributing the living in the domain of value and utility. Such a power has to qualify, measure, appraise, and hierarchize, rather than display itself in its murderous splendor...I do not mean to say that the law fades into the background or that the institutions of justice tend to disappear, but rather that the law operates more and more as a norm, and that the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory. (Foucault, 1978: 144)

Thus, for Foucault, the era of bio-power does not signal the irrelevance, or 'death', of law; nor does it spell the end of law's traditional association with the juridical notion of power relations. Rather, the point is that the law's function partially adapts in order to align itself with the logic of power (measurement, appraisal, normalisation) characteristic of bio-power. It begins to perform a more positive, regulatory, and productive role, rather than remaining exclusively bound to its traditional deductive, juridical function.

In what follows, I will try to demonstrate how Foucault's two notions of power relations (the juridical and bio-power) offer useful tools by which to think through the function and power of contemporary law as manifested in two recent cases concerning the ending of human life in the medical context.

IV Life, Death, and the Juridical Nature of Legal Power

If there is a case that illustrates the juridical nature of contemporary legal power

in the area of life, death, and medical practice, then *Re A (Children)* is it.¹⁶ The judgment of Ward LJ in the Court of Appeal not only makes us aware of the self-proclaimed privilege of law in managing contested questions surrounding the ending of human life; it also offers insights into the character of legal power that manifests itself in the course of such management. In this section, I will argue that aspects of Foucault's analysis described above provide us with tools by which to comprehend an instance of law's power over life and death. In doing so, however, I will suggest that it is death and his notion of the juridical – the two elements that Foucault envisaged as being of diminishing relevance in the age of bio-power – that are of most value here. Before that, though, it is necessary to set out, briefly, some of the background to the case and the manner in which Ward LJ arrived at his decision.

Given the amount of discussion this case has engendered in both academic and non-academic circles, its facts are generally well known. Consequently, only a short summary of these – in the words of Ward LJ – is required:

Jodie and Mary are conjoined twins. They each have their own brain, heart and lungs and other vital organs and they each have arms and legs. They are joined at the lower abdomen. Whilst not underplaying the surgical complexities, they can be successfully separated. But the operation will kill the weaker twin, Mary. That is because her lungs and heart are too deficient to oxygenate and pump blood through her body...She is alive only because a common artery enables her sister, who is stronger, to circulate life sustaining oxygenated blood for both of them...[I]f the operation does not take place, both will die within three to six months, or perhaps a little longer, because Jodie's heart will eventually fail. The parents cannot bring themselves to consent to the operation. The twins are equal in their eyes and they cannot agree to kill one even to save the other. The doctors are convinced they can carry out the operation so as to give Jodie a life which will be worthwhile. So the hospital sought a declaration that the operation may be lawfully carried out. Johnson J. granted it...The parents applied to us for permission to appeal against his order [and] [w]e have given that permission.¹⁷

¹⁶ *Re A (Children)* [2000] 4 All ER 961

¹⁷ [2000] 4 All ER 961, at 969. For academic discussion of *Re A (Children)*, see, *inter alia*, the

Having set out the reason behind the need to involve the court – the clash of values between the twins’ parents and the hospital staff – Ward LJ transferred his attention to what he identified as the proper judicial function in the case: ‘This court is a court of law, not of morals, and our task has been to find, and our duty is then to apply the relevant principles of law to the situation before us – a situation which is quite unique.’¹⁸

The ‘situation’ he talks about is that of the twins themselves and not the disagreement between their parents and the hospital staff. Accordingly, he was required to identify a relevant legal principle that could be applied to the twins’ ‘unique’ situation. It was this – ‘the search for settled legal principle’ and its application to resolve the case – and not the ins and outs of moral philosophy and/or applied ethics, that Ward LJ had found ‘especially arduous’.

In performing this function, he began by pointing out that, in cases involving children, the relevant legal principle was that of the welfare of the child and that this had to be the court’s paramount consideration (Children Act 1989, section 1(1)). However, this particular case posed a problem for the application of the welfare principle as the nature of each twin’s interests differed and, consequently, could not both be made paramount.¹⁹ This lack of an applicable legal principle did not mean, however, that the Court would simply be unable to resolve the case. Significantly, Ward LJ said that the Court *had* to make a decision;

essays in Sheldon and Wilkinson (2001).

¹⁸ [2000] 4 All ER 961, at 969.

¹⁹ The interests of the stronger twin (Jodie) would best be served by proceeding with the operation to separate her from her sister (Mary), while the interests of Mary would best be served by not operating and allowing her life to continue, albeit for a short period of time.

otherwise, '[It] would be a total abdication of the duty which is imposed on us.'²⁰ His 'search for settled legal principle' ended in the judgments of Kennedy LJ and Evans LJ at the Court of Appeal stage in *Birmingham City Council v H (A Minor)*.²¹ Referring to their judgments, Ward LJ said: 'I can see no other way of dealing with [the conflict of duty] than by choosing the lesser of the two evils and so finding *the least detrimental alternative*. A balance has to be struck somehow and I cannot flinch from undertaking that evaluation, horrendously difficult though it is.'²²

But how was the legal principle of the least detrimental alternative to be measured and to what conflict, exactly, was it to be applied to resolve? Focussing solely upon the circumstances of the twins, Ward LJ set himself an 'analytical problem' that involved weighing what he identified as being the respective interests of the twins and '[doing] what is best for them'.²³ An example of this process can be seen in the judge's approach to the twins' differing physical attributes. Thus, in contrast to Jodie, who is portrayed as strong and having the potential to engage in life, Mary's condition means that, whatever action is taken, she is 'doomed for death'. The manner in which Ward LJ summarises the physical characteristics of the twins leaves little room for debate in establishing the least detrimental alternative: '[The weaker] sucks the lifeblood

²⁰ [2000] 4 All ER 961, at 1006.

²¹ [1994] 2 AC 212. In this case, the local authority had applied for a care order in respect of a baby. The baby's mother, however, was only 15 years old and thus a 'child' herself. The Court of Appeal in that case, unlike the House of Lords on appeal, viewed the issue of contact between mother and child as incorporating the question of the upbringing of each of them. Thus, the welfare of each child was paramount.

²² [2000] 4 All ER 961, at 1006. My emphasis.

²³ [2000] 4 All ER 961, at 1010.

out of [the stronger]...If [the stronger twin] could speak, she would surely protest, “Stop it, Mary, you’re killing me”. Mary would have no answer to that.’²⁴ After placing several other factors in the scales, the judge arrived at his ‘actual balance sheet of advantage and disadvantage’, concluding that: ‘The best interests of the twins is to give the chance of life to the child whose actual bodily condition is capable of accepting the chance to her advantage even if that has to be at the cost of the sacrifice of the life which is so unnaturally supported.’²⁵ This, in Ward LJ’s view, was the least detrimental alternative. Consequently, the operation was deemed to be lawful and subsequently performed.

In several ways, *Re A (Children)* can be thought of as the ‘juridical’ medical law case *par excellence*. First, and at the most basic and obvious level, it displays an instance of contemporary law’s privilege ‘to take life or let live’. The sovereign power claimed for the law by Ward LJ to decide ‘disputed matters of life and death’ necessarily incorporates that sovereign, juridical power which Foucault terms ‘the right to decide life and death’.²⁶ The Court of Appeal clearly wields its sword (its ‘right of death’) by sanctioning the death of the weaker twin at the hands of the surgeon’s knife. At a purely physical level, then, the law perfectly conforms to the defining characteristics of juridical power – it is a vertically applied (deductive) power that sanctions the suppression, or seizure, of life itself. To put it in Foucault’s rather colourful language, it is an example of a power that

²⁴ [2000] 4 All ER 961, at 1010.

²⁵ [2000] 4 All ER 961, at 1011.

²⁶ *Oxford English Dictionary*: ‘Pre-eminently, *adv.* In a pre-eminent manner or degree; in the highest degree; very highly, supremely.’ ‘Sovereign, *a.* Of things, qualities, etc.: Supreme, paramount, principal, greatest, or most notable.’ My use of the word sovereign as a synonym for Ward LJ’s ‘pre-eminently’ is intended to stress the ‘supreme’ role of courts of law in ‘[d]eciding disputed matters of life and death...’.

‘display[s] itself in its murderous splendor...’ (Foucault, 1978: 144).

Of course, it might be objected that this is not the type of scenario that Foucault was referring to when describing the nature of juridical power over life and death, especially as the right of death in the present context was exercised for the purpose of saving another’s life. It can be distinguished, one might argue, from the case Foucault had in mind, where the sovereign sends his subjects to their deaths in order to protect his own existence. After all, is not the justification for death in the present context admirable – not the protection of the judges’ own lives, but that of another who will be capable of engaging in a full and healthy life? Is it not more akin to the justification Foucault identifies for the persistence of killing in the age of bio-power – i.e. that it occurs in order to protect life generally? Perhaps; but I want to suggest that this more utilitarian interpretation of the Court’s decision misses an important aspect of the case that *is*, contrary to the possible objections just outlined, capable of being explained by way of the notion of juridical power.

This second ‘juridical’ aspect of the case can be described as follows: the right of death is exercised in order to protect what might loosely be referred to as the ‘life’ of the law.²⁷ In other words, while there is clearly no question of the judges’ lives being at risk, their failure to exercise the right of death might endanger the law itself, and, in particular, the contemporary sovereign function claimed by Ward LJ

²⁷ For a similar type of point in the medical law context, see Diamantides (1995), in which Diamantides argues that the judiciary’s ascription of interests to an insensate Anthony Bland in *Airedale NHS Trust-v-Bland* [1993] AC 789 (its need to ‘resuscitate’ him) was necessary in order to sustain the relevance of the ‘best interests’ test to situations where patients are in permanent vegetative states. This test is routinely applied in cases where individuals are found to lack the requisite mental capacity to make their own decisions about medical treatment.

for courts of law ('deciding disputed matters of life and death'). One can begin to explain this by recognising what is at stake for Ward LJ in *Re A (Children)*. From the foregoing discussion of the case, it is clear that what bothered him was making clear the point that the common law, and especially its established institutional practices, must, at all costs, be defended against the potential threat posed by the 'hard' nature of the case. The temptations to slip into moral discourse and deliberation, to be seduced by sympathy for the parents' predicament and views, or to refuse to make a decision at all, needed to be resisted stubbornly by re-emphasising some central tenets of common law reasoning. Thus, the overriding judicial function was to discover, in the canon of the common law, the relevant legal principles that could be applied to resolve the case and to produce the correct *legal* answer:

They [cases where providing or withholding medical treatment is a matter of life and death for the incompetent patient] are always anxious decisions to make but they are invariably eventually made with the conviction that there is only one right answer and that the court has given it.²⁸

This emphasis on resolving the situation, on arriving at an answer, was a crucial factor in the case. As we saw earlier, Ward LJ couched this institutional exigency in terms not only of right, but of judicial duty too. The judiciary could not, for lack of a relevant legal principle, simply refuse to make a decision; in order to meet its responsibilities, it *had* to find the relevant legal principle, apply it to the circumstances of the case, make a decision, and, one might add, *be seen to do so*.

In concrete terms, this need to sustain the institutional practices and exigencies

²⁸ [2000] 4 All ER 961, at 968.

of the common law (the 'life' of the law) led to the exercise of the law's right of death in the following way. Having eventually discovered the relevant legal principle (the least detrimental alternative), the responsibility of the Court was to apply that principle to resolve what it took to be the situation before it. The clearest way in which this duty could be accomplished was by constructing a 'conflict' between the twins themselves in which their respective interests and characteristics would be presented in a polarised fashion (weak/strong, capable/not capable of engaging in life). The resolution of the 'conflict' – involving the death of the weaker twin – through application of 'the least detrimental alternative' principle would therefore appear almost a foregone conclusion. In other words, in this case the sustainability of the claim that the common law, and its practices, offer the most appropriate means by which a society can decide contested issues of life and death depended on the Court being seen to resolve a conflict successfully; the most effective way it could do this was by exercising its right of death.

The third and final 'juridical' aspect of the case once again concerns the idea of *suppression*. Here though, the power exercised by the Court results in different forms of suppression. On the one hand, it directly negates, or overtly suppresses, the views of the twins' parents and prohibits their proposed course of action. Like the taking of the weaker twin's life, one witnesses a deductive form of power at work here. On the other hand, I will argue that more tacit instances of suppression can be identified. While these examples of suppression are obviously less clearly identifiable from the judgments than the negation of the

parents' views, they nevertheless still involve suppression or prevention. For that reason, they offer a further example of the juridical form of power present in the case. In respect of both forms of suppression, I will seek to demonstrate that the conditions of their existence lie predominantly in the institutional practices and exigencies of the common law.

The first 'suppressive' feature relates to the views expressed by the twins' parents. They had been unable to consent to the operation necessary to separate the twins mainly for the following reason:

“We cannot begin to accept or contemplate that one of our children should die to enable the other to survive.....Everyone has the right to life so why should we kill one of our daughters to enable the other to survive.....We have faith in God and are quite happy for God's will to decide what happens to our two young daughters.”²⁹

While Ward LJ took care to describe the parents' views at length, his following conclusion on these illustrated the unequivocal power of law in cases of life and death:

In my judgment, parents who are placed on the horns of such a terrible dilemma *simply have to* choose the lesser of their inevitable loss. If a family at the gates of a concentration camp were told they might free one of their children but if no choice were made both would die, compassionate parents with equal love for their twins would elect to save the stronger and see the weak one destined for death pass through the gates.³⁰

One interpretation of this statement would be to see it as a Manichaeistic depiction of the nature of parents' possible responses to the reality confronting the twins' parents in this case. By suggesting that there can only exist one possible course of action, Ward LJ divides parents' responses into two 'moral'

²⁹ [2000] 4 All ER 961, at 985-6. There were other reasons why the parents refused to consent to the operation, such as their worry that, if the stronger twin survived the operation, she may be left with a grave disability making it very difficult for them to cope financially and personally, particularly in view of the lack of adequate facilities in their homeland. For the purposes of this article, I shall concentrate on the reason set out in the quotation.

³⁰ [2000] 4 All ER 961, at 1009-10. My emphasis.

camps – the first being those who are ‘compassionate’ parents and would feel compelled to save the stronger twin; the second (those who would do nothing), by implication, being the morally impoverished group who lack compassion. This polarisation of what is to be expected of parents in such circumstances is a perfect illustration of what Pierre Bourdieu has called ‘the universalization effect’ in the ‘juridical field’ (a field that includes judges): ‘The *universalization effect* is created by a group of convergent procedures:...[including] reference to transsubjective values presupposing the existence of an ethical consensus (for example, “acting as a responsible parent”)...’ (Bourdieu, 1987: 820. Emphasis in original)³¹ Ward LJ uses the moral qualities of ‘compassion’ and ‘love’ to suggest that there exists a moral consensus on the course of action that parents would take in such circumstances. By definition, the views and beliefs of those parents who would not save the stronger twin are to be negated and their characters conjured up as morally aberrant. Thus, given that the parents’ chosen course of action in this case is alien to the moral perspective of the judge (and, for the purposes of the legal case, the moral perspective of what one might call ‘the reasonable parent’), it is simply negated. In keeping with a juridical notion of power relations, their proposed course of action, one might say, transgresses the moral threshold of conduct defined by the judge and must, as a consequence, be prohibited.

However, to confine the explanation of this negation to the level of the purely

³¹ Bourdieu’s use of the term ‘juridical’ is very different to that which one finds in Foucault’s work. However, as nothing rests on the distinction in the present context, I shall refrain from saying anything more about it.

moral, fails to take account of how the judge's words sit in, and indeed are a product of, the institutional context within which they are uttered. Discussing the same quotation, Scott Veitch has argued that:

The two objective, universalised, values or norms – Ward LJ's and the parents' – may conflict in an incommensurable way – that is, in such a way that to make them commensurable would fundamentally misunderstand and destroy the meaning and practice of one of them – yet, and this is the key point, the legal institution cannot countenance incommensurables. Its *decisionistic imperative and its social priority* impel it to commensurate, and for this reason the law cannot truly countenance, cannot bear, the tragedy thrown up by the situation. *It must resolve it, and this is the particular force of law.* (Veitch, 2006. My emphasis)

In other words, as a simple moral conflict, the clash of values arising from the parents' views and those of Ward LJ is irresolvable without negating the meaning of either, or even both, views. However, given the particular context within which the conflict exists, it cannot be left to fester. As we saw earlier in relation to the law's exercise of its 'right of death', in order to satisfy the common law's need for finality, a decision must be made. But rather than speak of 'resolution', there is just plain suppression of the parents' views and values. Indeed, the unwillingness of the Court to focus on trying to resolve the original conflict before it – that between the parents and the medical staff – results in the need to create an artificial conflict (between the twins themselves) capable of resolution by the application of legal principle (the least detrimental alternative). The difficulty of applying this principle to the parents' views (their religious views meant there was *no alternative*, far less a least detrimental one, open to them), means that these must simply be negated. In order for the judiciary to do its work properly, and uphold a central tenet of common law reasoning, some sort of imbalance in the circumstances before the Court must exist (a 'lesser of their inevitable loss') to

which the legal principle can concretely be applied to resolve. As such, the intransigent moral reasoning behind the parents' views had to be met not merely by counter-moral argument, but by the unequivocal, juridical power of the law.

What one witnesses here, then, is a clear effect of the juridical power of the common law. The parents' views and proposed course of action are not only fully set out by the judge; they are manifestly suppressed too. Suppression, here, equates to prevention or inhibition. But this tangible suppression of their views and wishes has, concomitantly, a further suppressive effect, which is less obvious in character, and relates to more general issues that the case can be thought to touch upon. Thus, fundamental questions such as: What is the nature of parenthood?; Is this really a matter for the State and, if it is not, to what extent should the State be allowed to interfere in the private lives of citizens?; Should the State be able to ride roughshod over parents' religious beliefs?, are conspicuous by their absence from the judges' opinions.³² The disagreement, conflict, and debate inherent in such issues never surface in the Court of Appeal. Instead, they are suppressed, but this time *tacitly*. What we are dealing with here is suppression in the sense of 'keeping secret' or 'refraining from mentioning' something that ought to be revealed or that may be understood from the context. In other words, while those broader questions may be thought to be integral to the nature of the case, no space is provided in the course of the hearing for the debate and disagreements they engender to be played out.

³² Additionally, despite the impending implementation of the Human Rights Act 1998, the judges hearing the case did not consider it necessary to reflect, in any detail, upon how the legislation may impact upon such a case.

It should be pointed out that this suppression of those central underlying issues does not mean that decisions are not being made about them; they clearly are. It simply means that those decisions are obscured from view by the emphasis that is placed on legal precedent and the need to search for, and identify, the appropriate legal principle to be applied to the 'conflict' between the twins. Indeed, it might be thought that the precise effectiveness of this technique of common law reasoning in the case lies in its ability to render invisible, and therefore immune to criticism, the fact of the Court's involvement in making controversial decisions about fundamental issues over which there is legitimate disagreement, but without that disagreement being played out in the legal forum.

Furthermore, whatever the broader reasons for the increasing invocation of law as a means of settling disputes about life and death arising in the field of medical practice, the very naturalness of law's appropriation of those disputes, and their consequent subjection to techniques and exigencies of common law reasoning that are held out as being objective and neutral, makes it much less likely that this appropriation and subjection, and their consequences, will attract debate or criticism.³³ This is because courts of law would appear to be the self-evident social arbiters of such sensitive disputes. Their practices and the expertise of their personnel in matters of dispute resolution lend an unquestioned air of legitimacy to Ward LJ's authoritative claim to legal power over life and death.

One of the consequences of this state of affairs is that academic criticism of legal

³³ This is not to say that there has been no criticism of law's involvement in 'life and death' cases. In the context of *Re A (Children)*, for example, John Harris touches upon the question of how we might usefully decide such cases. However, rather than fundamentally questioning the role of law, or the structural features of common law reasoning, Harris, as one would expect (given he is a moral philosopher), critically analyses the *ethical* reasoning of the judges. See Harris (2001).

power in this area tends to take the form of squabbling over the specifics of particular judicial rulings and their outcomes. The unquestioned assumption about the legal *appropriation* of disputes concerning life and death deflects critical attention away from the wider question of the *appropriateness* of subjecting those disputes to the practices and techniques of common law reasoning in the first place. Perhaps more than any others, then, it is those instances of tacit suppression – especially the ability of the common law to operate in such a way as to suppress, or prevent, the possibility of criticism before it is even realised that there is something to be criticised – that most clearly define the extensive reach of law’s juridical power over life and death in this case. Of course, the sanctioning of the weaker twin’s death and the prevention of the parents’ proposed course of action offer up clear and particular instances of the consequences of the law’s sword. But it is this less obvious, but by no means less significant, power of tacit suppression, and the specific institutional conditions of its existence (the operation of the common law’s practices and reasoning techniques) that ought also to be both noted and give rise to questions regarding Ward LJ’s sweeping claims to judicial sovereignty over contested issues of life and death.

Let me now draw together the main strands of the foregoing discussion. First, far from being of diminishing relevance today, I have argued that Foucault’s notion of the juridical is alive and well, at least in that area of medical law concerned with disputes over the ending of human life. More specifically, in *Re A (Children)* it is possible to witness several juridical effects of the operation of contemporary legal

power over life and death. Thus, not only do we see examples of the law's deductive power (the exercise of its 'right of death' (its 'seizure' of life) and the direct negation of the parents' views and wishes); we also encounter less obvious instances of suppression (the smothering of disagreement and conflict) that are, nevertheless, of great significance. Secondly, I have noted the conditions responsible for the production of those juridical effects in the 'Twins' case. These relate to the institutional practices and requirements of the common law, including the need to search for the correct legal principle to apply to the situation the Court defines as requiring resolution, and the judiciary's obligation to arrive at a final answer, rather than refusing to decide the case at all.

Finally, I noted how some of the less apparent juridical effects were masked by the ways in which law's power was both asserted and functioned – that is, as an authoritative claim to sovereignty over disputes about life and death, and by means of objective modes of legal reasoning. These modes of assertion and functioning not only produce the 'masking' effect just described; they also undercut the likelihood of critical analysis, because they are assumed to be the natural mechanisms by means of which to settle disputes over life and death in the medical context.

V Law, Discipline, and Productive Power

In this section, I seek to demonstrate how contemporary legal power over the existence of human life in the medical context can be interpreted as disciplinary – that is, as exhibiting one aspect of Foucault's bio-power. In order to do so, I will take as my focal point the recent case of *Re B (an adult: refusal of medical*

treatment).³⁴ But while I will argue that it is possible to differentiate the ways in which legal power operates in *Re A (Children)* and *Re B*, I also want to emphasise the similar way in which the court's function is asserted in both cases. In other words, despite the existence of a different mode of operation of power (disciplinary power) in *Re B*, the High Court's assertion of its function as a neutral arbiter that, by stressing the need to focus on technical legal tests and precedent, makes no 'value' judgment on the course of action proposed by the woman at the centre of the case – Ms B – exhibits close parallels with Ward LJ's approach to legal reasoning in *Re A (Children)*.

The case arose out of the unwillingness of clinicians caring for Ms B – who had become a tetraplegic as a result of a haemorrhage of the spinal column in her neck – to comply with her request not to be kept alive by means of artificial ventilation. This unwillingness did not arise because Ms B was found to lack the requisite mental capacity to make a decision to refuse medical treatment – indeed, it was decided that she did have such a capacity; rather, the clinicians' refusal to comply with her wishes stemmed from the fact that what they were being asked to do contravened one of the central tenets of their professional practice – that is, to strive to maintain human life. In these circumstances, Ms B sought the intervention of the High Court. Specifically, she asked the Court to declare that she did, indeed, have the necessary mental capacity to refuse

³⁴ [2002] 2 All ER 449 (hereinafter referred to as *Re B*). It should be noted that I have, along with Derek Morgan, described and analysed *Re B* in some detail in a previous article – see Morgan and Veitch (2004). Consequently, I will keep my description of what I take to be the relevant parts of the case brief. In the present article, I am more interested in deepening the analysis of the nature of contemporary legal power over the continued existence of human life – and the attempt to position this within a broad Foucaultian framework – begun in the previous article.

medical treatment, and that the maintenance of the artificial ventilation constituted a trespass to her person. The Court held that she had the requisite mental capacity described and that the NHS hospital trust concerned had acted unlawfully by failing to resolve the dispute over Ms B's predicament expeditiously.

The objective of the common law test for mental capacity in such circumstances is to establish whether the patient has understood the nature, purpose, and effects of a proposed medical treatment.³⁵ If this understanding is found to exist, then the patient is declared to have mental capacity and, in law, can exercise his or her right to self-determination by demanding that his or her wishes are carried out.³⁶ The legal test for mental capacity itself is invariably held out by members of the judiciary as a technical or scientific procedure, with the necessary assessment that it entails often best performed by medical experts, especially psychologists and/or psychiatrists. Consequently, one of the test's main benefits is thought to be its objectivity, which, in turn, allows courts to create the impression of legal neutrality. In other words, it allows members of the judiciary to declare that they are neither involved in making value judgments about patients' proposed courses of action, nor in making explicit decisions about life and death. This, for example, is Butler-Sloss P's summary of her judicial function in *Re B*:

I shall...have to consider in some detail her ability to make decisions and in particular

³⁵ For the specific factors a patient must demonstrate in order to be declared to have mental capacity, see *Re MB (An Adult: Medical Treatment)* [1997] 2 FCR 541. The Mental Capacity Act 2005 – which received Royal Assent in April 2005, and is likely to come into force in April 2007 – essentially enshrines the test for mental capacity at common law in statute. See section 3 of this Act for the test to determine whether or not an individual is able to make a decision for himself or herself.

³⁶ As the law will not force clinicians to provide medical treatment to patients that goes against the former's clinical judgment, in practice compliance with patients' wishes is confined to refusals of medical treatment.

the fundamental decision whether to require the removal of the artificial ventilation keeping her alive. It is important to underline that *I am not asked directly to decide whether Ms B lives or dies but whether she, herself, is legally competent to make that decision.*³⁷

The sole concern of the judge, then, is not to make a direct decision about life and death, but to establish Ms B's mental ability to make a decision about medical treatment (to refuse it), the consequence of which will be death.

Morgan and I have argued elsewhere that this attempt to create a division within the judicial function between assessing the patient's mental capacity to make decisions regarding medical treatment (a proper role for courts) and assessing the nature of the patient's decision (effectively, a decision to die – an inappropriate function of the court) is untenable. (Morgan and Veitch, 2004: 116-20) The thrust of our reasoning for this contention is that the *nature* of patients' decisions is a pre-requisite for the existence of tests for mental capacity. In *Re B*, for example, the only reason that an assessment of Ms B's mental capacity was necessary was because the consequence of her proposed course of action would be death. Unlike the unquestioning acceptance which would have followed a decision that complied with the clinicians' wish to maintain ventilation, her actual decision had to be investigated in some detail. This meant that the Court necessarily became directly involved in questions of life and death. Its ultimate finding that Ms B did, indeed, possess the mental capacity to make the decision she had already made could not be anything but intimately bound up with the nature of her decision – one that revolved around the central question of the continued existence of human life. In short, *Re B* provided a further instance of

³⁷ [2002] 2 All ER 449, at 454-5. My emphasis.

the workings of contemporary legal power over life and death.

The combination of the fundamental nature of Ms B's decision and the focus upon the individual that the test for mental capacity demands, produced some revealing insights into just what types of factors the Court identified as crucial in making its decision about mental capacity, and, concomitantly, about the continued existence of human life. Again, Morgan and I have described these factors – which we identify as explanation, character, and imagination – in some detail. It is worth briefly saying something here, though, of what I take to be the most important feature relied on by the Court in arriving at its finding of mental capacity – namely, the question of character.

Having answered the Court's questions regarding the reasons for seeking to have the ventilator withdrawn, Ms B was then judged on the standard of her responses, the nature of her demeanour, and the quality of her character:

Her wishes were clear and well-expressed. She had clearly done a considerable amount of investigation and was extremely well-informed about her condition. She has retained a *sense of humour* and, despite her feelings of frustration and irritation which she expressed in her oral evidence, a considerable degree of *insight* into the problems caused to the hospital clinicians and nursing staff by her decision not to remain on artificial ventilation. She is, in my judgment, an exceptionally *impressive witness*. Subject to the crucial evidence of the consultant psychiatrists, she appears to me to demonstrate a very high standard of mental competence, *intelligence* and *ability*.³⁸

What one witnesses here is the type of inquiry that was really taking place during the Court's application of its test for mental capacity. The factors to which weight is attached are not confined to those necessary to demonstrate, for example, that Ms B has weighed the treatment information she has been given, balancing risks and needs, in arriving at a choice (i.e. one of the requirements of the legal test for

³⁸ [2002] 2 All ER 449, at 462. My emphasis.

mental capacity). Rather, the Court is also concerned with her demeanour, her character, and her attitude. Who is she, and how has she conducted herself throughout? Given the esteem in which the professional practice that she is seeking to confront and undercut is held, it is clear that she must not only explain her decision clearly but exhibit additional factors and traits that reach unspecified levels of character and attitude.³⁹ The significance of this in the context of the case, however, is that the assessment of those traits impacts directly on the Court's function of deciding whether or not to allow death.

This latter observation acts as a convenient entry point to a broader discussion of the manner in which legal power can be thought to operate in *Re B*, and how that mode of power differs from that present in *Re A (Children)*. Three points can be made here. The first is to note that, unlike Ward LJ's suggestion in *Re A (Children)* that there was effectively some established threshold of moral conduct which the proposed action of the twins' parents had transgressed, no such threshold of individual conduct is explicitly set out by the Court in *Re B*. Thus, Ms B's proposed course of action is not simply permitted or prohibited by reference to a standard of individual conduct that is identified in advance by the Court; the threshold, if any, remains invisible and indeterminate. Consequently, and at least in this respect, we are not dealing, here, with a juridical legal power in Foucault's

³⁹ What can be seen here is the expression in law of the results of a more general transformation that took place in medicine in the early part of the twentieth century. David Armstrong has described this transformation as follows: 'The medical gaze shifted from body to mind [during the 1920s]'. (Armstrong, 1983: 26) Importantly for the present discussion: 'The mind was represented to the gaze in words...The patient had to speak, to confess, to reveal; illness was transformed from what was visible to what was heard.' (1983: 25) For a discussion of the emerging focus on the patient's personality and identity in medicine – as opposed simply to his or her body – see Armstrong (1983): Chapters 11 and 12, and Armstrong (2002), Chapter 7.

sense. Rather, it is suggested that what can be detected in *Re B* is a contemporary manifestation in law of certain aspects of his notion of bio-power, specifically its disciplinary component. This can be seen in the assessment of Ms B's demeanour and attitude. Like Foucault's description of the 'examination' outlined earlier, in the course of the hearing knowledge is acquired of Ms B's character, amongst other things, and judgments made about this – specifically, the extent to which she has conformed to unspecified norms of behaviour that one might be entitled to expect of a person in her circumstances. The guiding questions are not, “‘Was this done? Who did it’”, but, ‘Who are you? Has your behaviour and conduct conformed to certain norms?’ In keeping with Foucault's observation that ‘the law operates more and more as a norm’ in the era of bio-power, law's power here manifests itself through testing, probing, measuring, and appraising, rather than ‘display[ing] itself in its murderous splendor’. Ms B must prove that she has acted responsibly and with a certain degree of control.⁴⁰

Secondly, and as I have already noted, Foucault's notion of the disciplinary is intended to convey a *productive, creative* power. Its objective is to control and shape human life (specifically the human body) in order to inculcate certain standards of behaviour and levels of functioning. Thus, rather than death, bio-power is squarely concerned with the development of useful human *life*. But as mentioned earlier, Foucault did not neglect the continued importance of death in the era of bio-power. He did, however, think that, rather than the direct taking of life associated with the juridical notion of power, bio-power could be described as

⁴⁰ Or, as Nikolas Rose describes one aspect of our contemporary ‘governmentality’: ‘[individual] acts of free but responsibilized choice’. (Rose, 1999: xxiii)

involving the disallowance of life to the point of death. While this phrase is somewhat cumbersome, what I simply wish to note from it is the clear distinction Foucault makes between a power that imposes death (the juridical) and one which – while bound up with producing death – does not directly impose it (bio-power). I would argue that it is the presence of this latter type of power that one witnesses in Ms B's case. Unlike the situation in *Re A (Children)*, in *Re B* there is no clear taking or seizure of life – no direct imposition of death – to speak of. Rather, given the clinicians' emphasis on the preservation of life, their reluctance to perform an act that would result in death, and the Court's clear concern to respect those professional values, it is more useful to think of the case in terms of the allowance of death. Moreover, rather than taking centre stage, death lurks in the wings, kept firmly at arms' length and, as much as possible, out of the legal discourse. Indeed, it might be said that death is produced, or allowed, by way of a focus on life. For example, the types of character traits emphasised by the Court – humour, insight, intelligence – are more in keeping with one fully engaged in life, rather than someone contemplating death. There is a sense in which the justification for death must be found to lie in the more recognisable and positive features of life.

Finally, combining the foregoing points, it can be said that it is the knowledge acquired by the Court of who Ms B is, rather than any determination of whether her proposed course of action flouts a pre-constructed threshold of individual conduct, that forms the basis of how the Court manages its function of deciding this contested issue of life and death. Her 'examination' and the degree to which

she is deemed to conform to unspecified norms of character and demeanour are directly relevant to the procedure by which the law allows death.

Consequently, the use of Foucault's work on life, death, and power in the current context can be read as a disturbance of his binary law-death-juridical and law-life-disciplinary characterisation of power relations. In other words, what a case such as *Re B* illustrates is that, whatever the relevance of Foucault's notion of disciplinary power to accounts of the role of law in the production of more useful human life, it is also useful in explaining one of the ways in which law manages a significant contemporary function – that is, the *production of death* in cases arising from the field of medical practice.

If the manner in which power operates in *Re B* is disciplinary, the assertion of law's power and function (by way of its focus on legal tests of mental capacity) as objective and neutral works to obscure this. As Tadros says: 'Disciplinary power is ideally invisible in its application...[It]...attempts to cast light away from itself and onto the individual.' (Tadros, 1998: 90) It is possible to see this process at work in *Re B*. The manner in which the Court sets up its function – to determine if Ms B has mental capacity – means that emphasis is, indeed, placed on the individual, in ways that can be thought to be both positive and neutral. In relation to the former, much is made of the importance attached by law in such cases to the autonomy of the individual – that is, her right to determine for herself whether to refuse medical treatment which is keeping her alive. Autonomy is invariably portrayed in the courts as one half of a polarised battle between itself and the sanctity of life principle. In the event of a contest between the two, it is settled law

that, at least in the case of adults deemed to have mental capacity, the former is always victorious. But, as we have already seen, the emphasis on the individual is also intended to be neutral and objective through the application of a test for mental capacity that is concerned solely with the state of the individual's mind – especially her ability to understand and retain information about medical treatment, and to weigh that information in the balance when arriving at her choice. The objectivity that is held out as being inherent in this process is meant to prevent any judgmental reflection on the individual and her abilities. If mental capacity is found to exist, autonomy follows, and that is the end of the matter. It is also used as a mechanism by which the law seeks to distance itself from potential accusations that it is directly involved in making decisions about sensitive questions concerning the ending of human life. It needs the safety of a 'technical' procedure that will allow it to assert its function as distinct from the one it is actually performing. Like the Court of Appeal in *Re A (Children)*, then, in *Re B* there is an institutional need for the law to define its role in neutral and objective terms.

As well as masking the existence of this disciplinary power, this assertion of the common law's objective and neutral function has also had an effect on the general nature of critical analysis in this area, and I will now reflect upon this as part of my concluding comments.

VI Conclusion

There can be little doubt that the relatively new academic discipline of medical law has been heavily shaped by ethical discourse. Whether it be, for example,

autonomy, best interests, beneficence, or justice, academic medical lawyers have often deployed the tools and principles of ethical analysis as a means of reflecting on the state of their subject. This mode of analysis has, itself, been intimately bound up with the question of which set of professionals – the doctors or the lawyers – ought to have the authority to resolve sensitive dilemmas and disputes arising from medical practice.⁴¹ Generally, the argument has run along the following lines: As the ethical dilemmas arising from medical practice do not merely involve medical issues, why should medical professionals have the sole authority to decide how such dilemmas are to be resolved? As other factors – such as the wishes of patients – are integral to those dilemmas, there needs to be some method of ensuring that these non-medical aspects are both aired and duly protected. The best way of doing this is to engage the assistance of law – specifically the courts – as members of the judiciary are experts in dispute resolution, pride themselves on their impartial approach, and have a tradition of upholding rights.

With the greater involvement of law in the resolution of such disputes, critical analysis has shifted to analysing the extent to which the courts are moving away from their traditional deference to the opinions and authority of the medical profession to exert their own authority in the form of upholding ethical principles such as the autonomy of patients. The focus partly becomes a quantitative one, in which the courts are urged increasingly to rely on, and implement, those types of principles – including autonomy and human rights – that pay due regard to the

⁴¹ Indicative of this type of analysis has been the work of Sheila McLean (see, for example, McLean (1999)) and Ian Kennedy (see, for example, Kennedy (1991), especially Chapter 20).

non-medical features of dilemmas arising from medical practice.

I would suggest, however, that this form of traditional critical analysis in the medical law field misses too much. For one thing, by exhorting law to intervene and claim authority over the growing number of issues and problems arising in the field of medical practice, it would seem to point to the need to explain law's increasing role in this area in purely jurisdictional terms. While this is certainly an important and very useful way in which to reflect upon the emerging role of medical law – in *both* its judicial *and* academic guises⁴² – it fails to address the other possible forces (such as transformations in what Dingwall and Hobson-West call the dominant mode of governmentality) behind the current tendency to view law as the most appropriate mechanism through which to settle our differences and conflicts. Thus, as well as acknowledging the significance of attempts made by law and lawyers to claim jurisdiction over traditionally medical issues, we must also try to account for law's more prominent role in terms, for example, of wider sociological changes and developments.

Secondly, by confining critical analysis of the law to the level of ethical discourse, and by placing faith in the ability of law to redress the apparent controversial exercise of medical power, the orthodox mode of critique in the medical law field fails to investigate the internal operation of *legal* power and the consequences that flow from *that*. In particular, its concentration on questions of ethics and

⁴² Insofar as the courts are concerned, we need look no further than Ward LJ's claim set out in the quotation at the beginning of this article for evidence of law's creeping jurisdiction in this area. As for the academics, it could be argued that the development of medical law as an academic subject has, at least in part, been driven by a desire to claim professional expertise over the variety of issues, problems, and dilemmas arising in the field of medical practice. Unfortunately, I do not have the space to advance this argument fully here.

ethical principle means that the integral role of the more mundane practices and techniques of the common law in the constitution and expression of legal power in this area is never really recognised or addressed. Their very obviousness and familiarity work to obscure the significance of their role from view. By deploying aspects of Foucault's work on power – specifically his notions of the juridical and the disciplinary – I have sought to offer a way in which these institutional mechanisms responsible for the subtle operation of power in one area of medical law can be grasped. So, for example, rather than concentrating on the ethical supportability or shortcomings of the outcome in *Re A (Children)*, I found the main source of power in Ward LJ's judgment to lie in his concern to uphold traditional techniques of common law reasoning. These techniques were fundamental to both the identification of the conflict to be resolved and the exclusion of more fundamental issues and questions the case could be thought to touch upon. Similarly, the High Court's emphasis on the 'technical' legal test for mental capacity in *Re B*, helped to mask the controversial nature of the inquiry actually undertaken in the process of determining capacity. This demonstrates that the common law's engagement with the individual in this area is not confined to defending the patient against medical power by giving him or her more autonomy; rather, on the route to a finding of patient autonomy, law's power over the individual is more subtle and less uncontroversial than the rhetoric of patients' rights would have us believe.

With the increasing level of legal involvement in disputes arising from medical practice, there needs to be a more multi-faceted approach to power than

currently exists in the academic medical law literature. In particular, it is necessary to acknowledge that power in this area does not exclusively revolve around questions of ethics or the relative authority of the legal and medical professions. Rather, one must also note the less obvious sources of legal power – the apparently neutral and objective institutional practices of the common law – and the subtle, but often controversial, effects that these produce.

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